



DEPARTMENT OF ENERGY

10 CFR Part 626

RIN 1901-AB56

Procedures for the Acquisition of Petroleum for the Strategic Petroleum Reserve

AGENCY: Office of Cybersecurity, Energy Security, and Emergency Response, Department of Energy.

ACTION: Final rule.

SUMMARY: The Energy Policy Act of 2005 directed the Secretary of Energy to develop procedures for the acquisition of petroleum products for the Strategic Petroleum Reserve (“SPR”). Pursuant to that direction, in 2006, the Department of Energy (“DOE” or the “Department”) promulgated the Procedures for Acquisition of Petroleum for the Strategic Petroleum Reserve. Over the intervening 16 years, the existing regulations have become outdated due to changes in statutory authority, agency practice, and market dynamics. In this final rule, DOE is amending its regulations on the procedures for the acquisition of petroleum products for the SPR to: more closely align the regulatory language with the applicable statutory language; remove outdated procedures for acquisition under the royalty-in-kind program; add procedures for acquisition by exchange to better reflect petroleum product acquisition operations as conducted by the Office of Petroleum Reserves; and increase the Department’s flexibility in structuring acquisitions.

DATES: This final rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

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SUPPLEMENTARY INFORMATION:

- I. Background and Introduction
- II. Discussion of Final Rule and Response to Comments
 - A. Summary of the Final Rule
 - B. Response to Comments
- III. Regulatory Review
- IV. Congressional Notification
- V. Approval of the Office of the Secretary

I. Background and Introduction

The SPR was established by the Energy Policy and Conservation Act (“EPCA”), (Pub. L. 94–163), to store petroleum products to diminish the impact of disruptions on petroleum supplies and to carry out the obligations of the United States under the International Energy Program. (42 U.S.C. 6231 *et seq.*) Section 160 of EPCA authorizes the Secretary of Energy to acquire petroleum products for the SPR. Subsequently, the Energy Policy Act of 2005, (Pub. L. 109–58), amended EPCA and directed the Secretary of Energy to develop, with the opportunity for public notice and comment, procedures for the acquisition of petroleum products for the SPR. (42 U.S.C. 6240) The principal method for acquiring SPR petroleum products is by purchase, but SPR petroleum may also be acquired via exchange. (42 U.S.C. 6240(a)) On November 8, 2006, and pursuant

to EPCA, as amended by the Energy Policy Act of 2005, DOE established procedures for the acquisition of SPR petroleum at 10 CFR part 626. 71 FR 65376 (“2006 final rule”). The 2006 final rule included provisions regarding the direct purchase, exchange, and transfer of royalty oil from the Department of the Interior (“DOI”).

Subsequent to DOE promulgating the 2006 final rule, the Government Accountability Office and the DOI Inspector General published several reports between 2008 and 2009 on the shortcomings of and personnel misconduct related to the royalty-in-kind program, and, as a result, the DOI terminated its royalty-in-kind program in 2010. Then, in 2013, with section 306(a) of the Bipartisan Budget Act of 2013, (Pub. L. 113–67), Congress repealed DOE’s authority to conduct SPR acquisitions under the royalty-in-kind program that was incorporated into the 2006 final rule.

Prior to this final rule, 10 CFR part 626 had not been updated since it was promulgated by DOE in the 2006 final rule, and, thus, did not reflect the intervening changes to the authorizing statutory authority. Additionally, over the last few decades, DOE has conducted numerous exchanges, mostly in an emergency exchange capacity; however, part 626 did not clearly outline those exchange procedures. Lastly, under the original iteration of part 626, the Department found itself less able to structure acquisition contracts in response to recent changing petroleum product market dynamics.

Accordingly, considering these circumstances, DOE has determined that a revision to these regulations to provide more clarity; better reflect the underlying statutory authorities, operational practices, and realities; and provide additional flexibility in structuring acquisitions is warranted.

On August 4, 2022, DOE published the notice of proposed rulemaking (“NOPR” or “proposed rule”) to amend its regulations at part 626. (87 FR 47652) Publication of the NOPR began a 30-day public comment period that ended on September 6, 2022. DOE received five comments: four of which were outside the scope of the proposed rule

and a fifth that was in support of DOE’s proposed rule. The NOPR and comments received on the NOPR can be accessed at: <https://www.regulations.gov/document/DOE-HQ-2022-0022-0001>.

II. Discussion of Final Rule and Response to Comments

A. Summary of the Final Rule

The final rule revises 10 CFR part 626 in several respects. First, the final rule updates language throughout part 626 to more closely align with the statutory language found in section 160 of EPCA. This includes updating the definitions for “DOE”, “Exchange”, and “Strategic Petroleum Reserve”, while adding new definitions for “Premium”, “Requestor”, and “Solicitation”. The definition pertaining to “DOI” is also struck. These changes provide more clarity and maintain continuity throughout the part while supporting other changes.

Second, because Congress repealed DOE’s authority to acquire “crude oil which the United States is entitled to receive in kind as royalties from production on Federal lands” in 2013, all references to the royalty-in-kind program in part 626 have been removed. This includes removal of the procedures for acquisition under the royalty-in-kind program previously found at 10 CFR 626.7.

Third, the final rule codifies procedures for the exchange of petroleum products at the revised 10 CFR 626.7 and adds references to “exchange” throughout part 626, as appropriate. These changes are intended to reflect current operational practices of the SPR. Since 1996, in accordance with statutory authority in sections 159 and 160 of EPCA, DOE has conducted over a dozen emergency exchanges with private industry. In these emergency exchanges, upon request from refiners and verification of the request by DOE, the SPR provides emergency barrels of petroleum product to refiners; in return, the requesting refiners later provide the SPR the original number of barrels plus extra barrels

called a “premium.” In addition to the emergency exchanges by request, since 2000 and most recently in 2021, DOE has twice utilized the exchange authority to conduct solicitations for exchange, whereby the general public was permitted to bid to contract to accept barrels of SPR petroleum products in the present and return those barrels plus a premium in the future. DOE is now codifying these long-standing procedures into the acquisition regulations.

Fourth, the final rule amends 10 CFR 626.5 and 626.6 to increase flexibility for DOE to enter into contracts for the purchase of petroleum products, consistent with the requirements and objectives of section 160 of EPCA. These changes ensure that DOE continues to acquire petroleum products in accordance with the competitive principles of the Federal Acquisition Regulation and the DOE Acquisition Regulation, while providing DOE the flexibility to use either fixed-price or index-priced contracts for future petroleum product acquisitions. DOE is proposing these changes because the current acquisition regulations, including the requirement that DOE acquire oil in accordance with the Federal Acquisition Regulation and the requirement to use a price index to set purchase prices, unnecessarily restrict DOE’s flexibility to procure petroleum products using fixed-price contracts, notwithstanding the fact that there may be circumstances in which a fixed-price acquisition would better meet the statutory objectives of EPCA.

Lastly, the final rule adds 10 CFR 626.9 to implement subsection (f) of section 160 of EPCA. (42 U.S.C. 6240(f)) This final change has been included because, while the Department has had the statutory authority to suspend previously announced or contracted acquisitions of petroleum products or divert the injection of petroleum products into the SPR when there is a perceived imminent severe energy supply interruption, until now, this authority has not been incorporated into any existing regulations.

B. Response to Comments

The Department received five comments on the proposed revisions to 10 CFR part 626. Of those, four comments were outside the scope of the proposed rule; the single responsive comment supported the proposed rule. The comments received on the NOPR can be accessed at: <https://www.regulations.gov/document/DOE-HQ-2022-0022-0001/comment>.

The single positive comment was submitted by Employ America. Employ America stated that given the negative impact that volatile oil prices have on inflation, “the rule is an important step to reduce the volatility of oil prices over the short and medium term, improve our nation’s energy security, and a necessary step to ensure that acquisition procedures more fully align with the [SPR]’s governing statute.” Employ America indicated they “urge the DOE to ensure the final rule allows [the Department] to utilize fixed-price contracts with sufficient flexibility to achieve the objectives and procedural needs defined in the SPR’s governing statute.” That said, Employ America noted that fixed-price contracts should not always be used, but “given that the SPR must balance several objectives, it needs a toolkit that can be deployed as necessary to meet the entire set of objectives.” Finally, Employ America concluded that “[s]hould the proposed rule be finalized, the DOE will have the ability to realign its storage capabilities to better support and insure domestic producers against the risk of price crashes that have otherwise left them reluctant to invest.”

DOE has properly considered the comment and agrees with the intent and substance of the comment. Therefore, for the reasons discussed in the preamble and the proposed rule (87 FR 47652; Aug. 4, 2022), the Department is publishing the rulemaking as proposed.

III. Regulatory Review

A. Executive Order 12866

This final rule has been determined to not be a significant regulatory action under Executive Order 12866, “Regulatory Planning and Review.” 58 FR 51735 (October 4, 1993). Accordingly, this action was not subject to review under that Executive order by the Office of Information and Regulatory Affairs (“OIRA”) of the Office of Management and Budget (“OMB”).

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires the preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking, 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process, 68 FR 7990. The Department has made its procedures and policies available on the Office of General Counsel’s website:

www.energy.gov/gc/office-general-counsel.

The final rule updates the procedures DOE utilizes for the acquisition of petroleum products for the SPR, changes definitions, and removes references to the repealed royalty-in-kind program. DOE has reviewed the changes under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. These changes are procedural and not designed to set the terms or conditions of an acquisition and apply only to entities that are engaged in the sale of petroleum products to the Strategic Petroleum Reserve. Historically, Strategic Petroleum Reserve acquisitions have typically been large volume acquisitions, and usually filled by larger entities operating in the petroleum industry. Therefore, these procedures are unlikely to directly affect small businesses or other small entities. For these reasons, DOE certifies

that this final rule would not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking. DOE's certification and supporting statement of factual basis will be provided to the Chief Counsel for Advocacy of the Small Business Administration for review under 5 U.S.C. 605(b).

C. Paperwork Reduction Act of 1995

The final rule does not impose any new information or record keeping requirements. Accordingly, OMB clearance is not required under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

D. Review Under the National Environmental Policy Act of 1969

Per 10 CFR 1021.410(a), DOE has determined that promulgation of these regulations fall into a class of actions that does not individually or cumulatively have a significant impact on the human environment as set forth under DOE's regulations implementing the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Furthermore, this rulemaking is covered under the Categorical Exclusion found in DOE's National Environmental Policy Act regulations at paragraph A6 of appendix A to subpart D, 10 CFR part 1021, which applies to rulemakings that are strictly procedural. Accordingly, neither an EIS nor an EA is required.

E. Executive Order 13132

Executive Order 13132, "Federalism," 64 FR 43255 (August 10, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. The Executive order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. DOE examined this final rule and determined that it would not preempt State law and would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and

responsibilities among the various levels of Government. No further action is required by Executive Order 13132.

F. Executive Order 13175

Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” 65 FR 67249 (November 9, 2000), applies to agency regulations that have Tribal implications, that is, regulations that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. The final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175. Because this final rule will not significantly or uniquely affect the communities of the Indian tribal governments or impose substantial direct compliance costs on them, the funding and consultation requirements of Executive Order 13175 do not apply.

G. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, “Civil Justice Reform,” 61 FR 4729 (February 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct, rather than a general standard and promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that executive agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies its preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct, while promoting simplification and burden reduction; (4) specifies its retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any

guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the final rule meets the relevant standards of Executive Order 12988.

H. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (“UMRA”) (Pub. L. 104–4) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and tribal governments and the private sector. For a regulatory action likely to result in a rule that may cause the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy (2 U.S.C. 1532(a) and (b)). UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and tribal governments on a “significant intergovernmental mandate” and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA (62 FR 12820) (also available at www.energy.gov/gc/office-general-counsel). DOE examined this final rule according to UMRA and its statement of policy and has determined that the rule contains neither an intergovernmental mandate nor a mandate that may result in the expenditure of \$100 million or more in any year by State, local, and tribal governments,

in the aggregate, or by the private sector. Accordingly, no further assessment or analysis is required under UMRA.

I. Treasury and General Government Appropriations Act of 1999

Section 654 of the Treasury and General Government Appropriations Act of 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This final rule will not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

J. Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed the final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Executive Order 13211

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA and OMB, a Statement of Energy Effects for any significant energy action. A "significant energy action" is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1)(i) is a significant regulatory action under Executive Order 12866, or any successor order; and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (2) is designated by the Administrator of OIRA as a significant energy action. For any significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the

proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. This final rule updates DOE's acquisition of petroleum product procedures for the SPR to align the regulatory language more closely with existing statutory language and current practice. Accordingly, the final rule also updates definitions, as appropriate, for the newly aligned regulatory language. This final rule, therefore, does not meet any of the three criteria listed above and would not have a significant adverse effect on the supply, distribution, or use of energy and is therefore not a significant regulatory action. Accordingly, DOE has not prepared a Statement of Energy Effects.

IV. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this final rule prior to its effective date. The report will state that it has been determined that the final rule is not a "major rule" as defined by 5 U.S.C. 804(2).

V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this final rule.

List of Subjects in 10 CFR Part 626

Government contracts, Oil and gas reserves, Strategic and critical materials.

Signing Authority

This document of the Department of Energy was signed on October 19, 2022, by Puesh Kumar, Director for Cybersecurity, Energy Security, and Emergency Response, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned

DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the *Federal Register*.

Signed in Washington, DC, on October 20, 2022.

Treena V. Garrett
Federal Register Liaison Officer,
U.S. Department of Energy

For reasons stated in the preamble, DOE revises part 626 in chapter II of title 10 of the Code of Federal Regulations as set forth below:

PART 626—PROCEDURES FOR ACQUISITION OF PETROLEUM FOR THE STRATEGIC PETROLEUM RESERVE

Sec.

626.1 Purpose.

626.2 Definitions.

626.3 Applicability.

626.4 General acquisition strategy.

626.5 Acquisition procedures—general.

626.6 Acquiring petroleum products by purchase.

626.7 Acquiring petroleum products by exchange.

626.8 Deferrals of contractually scheduled deliveries.

626.9 Suspension and pre-drawdown diversion.

Authority: 42 U.S.C. 6240(c); 42 U.S.C. 7101, *et seq.*

§ 626.1 Purpose.

This part establishes the procedures for acquiring petroleum products for, and deferring contractually scheduled deliveries to, the Strategic Petroleum Reserve. The procedures do not represent actual terms and conditions to be contained in the contracts for the acquisition of SPR petroleum products.

§ 626.2 Definitions.

Backwardation means a market situation in which prices are progressively lower in succeeding delivery months than in earlier months.

Contango means a market situation in which prices are progressively higher in the succeeding delivery months than in earlier months.

Contract means the agreement under which DOE acquires SPR petroleum products, consisting of the solicitation, the contract form signed by both parties, the successful offer, and any subsequent modifications, including those granting requests for deferrals.

Contracting Officer means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings, including entering into sales contracts on behalf of the Government. The term includes certain authorized representatives of the Contracting Officer acting within the limits of their authority as delegated by the Contracting Officer.

DEAR means the Department of Energy Acquisition Regulation.

Deferral means a process whereby petroleum products scheduled for delivery to the SPR in a specific contract period is rescheduled for later delivery, outside of that period, and encompasses the future delivery of the originally scheduled quantity plus an in-kind premium.

DOE means the Department of Energy and includes any of its subsidiary offices, such as the Office of Petroleum Reserves (OPR) and the Strategic Petroleum Reserve Program Management Office.

Exchange means a process whereby petroleum products owned by or due to the SPR are provided to an entity or requestor in return for petroleum products of comparable quality plus a premium quantity of petroleum products (in barrels)—or another form of premium as permitted by law—delivered to the SPR in the future, or when SPR petroleum products are traded for petroleum products of a different quality preferred by DOE for operational reasons based on the relative values of the quantities traded.

FAR means the Federal Acquisition Regulation.

Government means the United States Government and includes DOE as its representative.

OPR means the Office of Petroleum Reserves within DOE, whose responsibilities include the operation of the Strategic Petroleum Reserve.

Petroleum products means crude oil, residual fuel oil, or any refined product (including any natural gas liquid, and any natural gas liquid product) owned, or

contracted for, by DOE and in storage in any permanent SPR facility, or temporarily stored in other storage facilities.

Premium means the additional amount of petroleum product (in barrels)—or another form of payment as permitted by law—that must be delivered to the SPR above the principal amount of petroleum product owed to SPR in the case of an exchange or a deferred contractually scheduled delivery. The premium may include a calculation based on a rate set by DOE and duration of time until the SPR receives the petroleum product.

Requestor is an entity that makes an emergency request under §626.7(b).

Secretary means the Secretary of Energy.

Solicitation means the written request by DOE for submission of offers or quotations to DOE for the acquisition of petroleum products.

Strategic Petroleum Reserve or *SPR* means the reserve for the storage of up to 1 billion barrels of petroleum products established by Title I, Part B, of the Energy Policy and Conservation Act, 42 U.S.C. 6201 *et seq.*

§ 626.3 Applicability.

The procedures in this part apply to the acquisition of petroleum products by DOE for the Strategic Petroleum Reserve through purchase or exchange, as well as to deferrals of contractually scheduled deliveries.

§ 626.4 General acquisition strategy.

(a) *Criteria for commencing acquisition.* DOE shall consider the following factors prior to commencing acquisition of petroleum products for the SPR:

- (1) The current inventory of the SPR;
- (2) The current level of private inventories;
- (3) Days of net import protection;

(4) Current price levels for petroleum products and related commodities, the ability to minimize costs and avoid incurring excessive costs in acquisition, and the possible effect on consumer and market prices of any SPR acquisition;

(5) The outlook for international and domestic production levels;

(6) Existing or potential disruptions in supply or refining capability;

(7) The level of market volatility;

(8) Futures market price differentials for petroleum products and related commodities;

(9) The need to protect national security; and

(10) Any other factor the Secretary deems necessary or appropriate to consider.

(b) *Review of rate of acquisition.* DOE shall review the appropriate rate of petroleum product acquisition each time an open market acquisition has been suspended for more than three months.

(c) *Acquisition through other Federal agencies.* DOE may enter into arrangements with another Federal agency for that agency to acquire petroleum products for the SPR on behalf of DOE.

§ 626.5 Acquisition procedures—general.

(a) *Notice of acquisition.* (1) Except when DOE has determined there is good cause to do otherwise, DOE shall provide advance public notice of its intent to acquire petroleum products for the SPR. The notice of acquisition will, to the extent feasible, include the general terms and details of DOE's petroleum products acquisition and inform the public of DOE's overall fill goals.

(2) The notice of acquisition will generally include the:

(i) Manner of acquisition;

(ii) Time period for solicitations;

(iii) Quantity of petroleum products sought;

(iv) Minimum petroleum product quality requirements;

(v) Time period for delivery;

(vi) Acceptable delivery locations; and

(vii) Instructions for the offer process.

(b) *Manner of acquisition.* (1) DOE shall specify the manner of petroleum product acquisition, either purchase or exchange, in the notice of acquisition.

(2) DOE shall, to the greatest extent practicable, determine the manner of petroleum product acquisition after considering:

(i) The availability of appropriated funds;

(ii) Minimization of costs;

(iii) Minimization of the Nation's vulnerability to a severe energy supply interruption;

(iv) Minimization of the impact to supply levels and market forces;

(v) Whether the manner of acquisition would encourage competition in the petroleum industry; and

(vi) Other considerations DOE deems to be relevant.

(c) *Solicitation.* (1) To secure the economic benefit and security of a diversified base of potential suppliers of petroleum products to the SPR, DOE shall maintain a listing, developed through online registration, direct requests to DOE, and outreach to potential suppliers by DOE. Upon the issuance of a solicitation, DOE shall notify potential suppliers via their registered e-mail addresses.

(2) DOE shall make the solicitation publicly available on the website of the OPR: www.spr.doe.gov.

(d) *Timing and duration of solicitation.* (1) DOE shall determine petroleum products requirements on nominal six-month cycles, and shall review and update these requirements prior to each solicitation cycle.

(2) Unless termination rights are explicitly waived by DOE, DOE may terminate any solicitations and contracts pertaining to the acquisition or exchange of petroleum products at the convenience of the Government, and in such event shall not be responsible for any costs incurred by suppliers, other than costs for petroleum products delivered to the SPR and for reasonable, customary, and applicable costs incurred by the supplier in the performance of a valid contract for delivery before the effective date of termination of such contract. In no event shall the Government be liable for consequential damages or the entity's lost profits as a result of such termination.

(e) *Quality.* (1) DOE shall define minimum petroleum product quality specifications for the SPR. DOE shall include such specifications in acquisition solicitations, and shall make them available on the website of the OPR: www.spr.doe.gov.

(2) DOE shall periodically review the quality specifications to ensure, to the greatest extent practicable, the petroleum product mix in storage matches the demand of the United States refining system.

(f) *Quantity.* In determining the quantities of petroleum products to be delivered to the SPR, DOE shall:

(1) Take into consideration market conditions and the availability of transportation systems; and

(2) Seek to avoid adversely affecting other market participants or petroleum product market fundamentals.

(g) *Offer and evaluation procedures.* (1) Each solicitation shall provide necessary instructions on offer format and submission procedures. The details of the offer, evaluation, and award procedures may vary depending on the method of acquisition.

(2) DOE may use relative values and time differentials to manage acquisition and delivery schedules to reduce acquisition costs.

(3) DOE may evaluate offers based on prevailing market prices of specific petroleum products, and shall award contracts on a competitive basis.

(4) Whether acquisition is by purchase or exchange, DOE may use a price index to account for fluctuations in absolute and relative market prices at the time of delivery to reduce market risk to all parties throughout the contract term.

(h) *Scheduling and delivery.* (1) Except as provided in paragraph (h)(4) of this section, DOE shall accept offers for petroleum products delivered to specified SPR storage sites via pipeline or as waterborne cargos delivered to the terminals serving those sites.

(2) Except as provided in paragraph (h)(4) of this section, DOE shall generally establish schedules that allow for evenly spaced deliveries of economically sized marine and pipeline shipments within the constraints of SPR site and commercial facilities receipt capabilities.

(3) DOE shall strive to maximize U.S. flag carrier utilization through the terms of its supply contracts.

(4) DOE reserves the right to accept offers for other methods of delivery if, in DOE's sole judgment, market conditions and logistical constraints require such other methods.

§ 626.6 Acquiring petroleum products by purchase.

(a) *General.* For the purchase of petroleum products, DOE shall, through certified contracting officers, conduct petroleum product acquisitions in accordance with the competitive principles of the FAR and the DEAR.

(b) *Acquisition strategy.* (1) DOE solicitations:

(i) May be either continuously open or fixed for a period of time; and

(ii) May provide either for immediate delivery or for delivery at future dates.

(2) DOE may alter the acquisition plan to take advantage of differentials in prices for different qualities of petroleum products, based on a consideration of factors, including the availability of storage capacity in the SPR sites, the logistics of changing delivery streams, and the availability of ships, pipelines, and terminals to move and receive the petroleum products.

(3) Based on the market analysis described in paragraph (d) of this section, DOE may refuse offers or suspend the acquisition process on the basis of Government estimates projecting substantially lower petroleum product prices in the future than those contained in offers. If DOE determines there is a high probability that the cost to the Government can be reduced without significantly affecting national energy security goals, DOE may either contract for delivery at a future date or delay purchases to take advantage of the projected lower future prices. Conversely, DOE may increase the rate of purchases if prices fall below recent price trends or futures markets present a significant contango and prices offer the opportunity to reduce the average cost of petroleum product acquisitions in anticipation of higher future prices.

(4) Based on the market analysis described in paragraph (d) of this section, DOE may refuse offers, decrease the rate of purchase, or suspend the acquisition process if DOE determines acquisition will add significant upward pressure to prices either regionally or on a world-wide basis. DOE may consider recent price changes, private inventory levels, petroleum product acquisition by other stockpiling entities, the outlook for world petroleum products production, incipient disruptions of supply or refining capability, logistical problems for moving petroleum products, macroeconomic factors, and any other considerations that may be pertinent to the balance of petroleum product supply and demand.

(c) *Fill requirements determination.* DOE shall develop SPR fill requirements for each solicitation based on an assessment of national energy security goals, the availability of storage capacity, and the need for specific grades and quantities of petroleum products.

(d) *Market analysis.* (1) DOE shall establish a market value for each petroleum product to be acquired based on a market analysis at the time of contract award.

(2) DOE may consider prices on futures markets, spot markets, recent price movements, current and projected shipping rates, forecasts by the DOE Energy Information Administration, and any other analytic tools available to DOE to determine the most desirable purchase profile.

(3) DOE may also consider factors including recent price changes, private inventory levels, petroleum product acquisition by other stockpiling entities, the outlook for world petroleum product production, disruptions of supply or refining capability, logistical problems for moving petroleum products, macroeconomic factors, and any other considerations that may be pertinent relevant to the balance of petroleum product supply and demand.

(e) *Evaluation of offers.* (1) DOE shall evaluate offers using:

- (i) The criteria and requirements stated in the solicitation; and
- (ii) The market analysis under paragraph (d) of this section.

(2) DOE shall require financial guarantees from the contracting entity, in the form of a letter of credit or equivalent financial assurance.

§ 626.7 Acquiring petroleum products by exchange.

(a) *General.* DOE may, through certified contracting officers, conduct petroleum product acquisitions through the exchange of petroleum products. Exchanges are conducted through emergency requests or by solicitation.

(b) *Emergency requests.* (1) Notwithstanding the requirements of §626.5, the requirements of this subsection shall control all exchanges by emergency request.

(2) At any point, in the event of an emergency, a requestor may request, in writing, for an exchange of petroleum product from the SPR.

(3) All requests shall include the following:

(i) A justification of need that describes:

(A) The emergency event,

(B) The emergency event's impact on the requestor, and

(C) The requestor's inability to acquire petroleum product from an alternative source;

(ii) The quantity of petroleum product (in barrels) requested;

(iii) The quality specifications of petroleum product requested; and

(iv) The anticipated duration of the emergency event.

(4) Upon receipt of an emergency request, DOE will verify the emergency, evaluate the need, and assess the market to ensure there is no alternative source of petroleum products available to the requester. DOE, in its sole discretion, may approve or disapprove any emergency request.

(5) Upon approval of an emergency request, DOE may enter into contract negotiations with the requestor.

(6) Repayment to the SPR for an exchange by emergency request shall be in the form of barrels of petroleum products, or another form of repayment as permitted by law, and shall include the following to be returned to the SPR by the contracted date:

(i) The principal amount of petroleum products provided to the requestor;

(ii) A premium; and

(iii) Costs incurred by DOE in conducting the emergency request.

(c) *Solicitation for exchange.* (1) A solicitation for exchange:

(i) May be either continuously open or fixed for a period of time;

(ii) Shall advertise the quantity and quality specification of petroleum product available for exchange;

(iii) May provide either for immediate delivery or for delivery at future dates to a bidding entity;

(iv) May, in DOE's sole discretion, include a rate table from which offerors may offer dates for repayment; and

(v) May require financial guarantees from offerors in the form of a letter of credit or equivalent financial assurance to accompany their bids.

(2) In conducting the bidding and selection process:

(i) Offerors shall follow the instructions to offerors included in the solicitation;

(ii) DOE shall evaluate and select bids that best support national energy security goals, the availability of petroleum products and storage capacity, and need for specific grades and quantities of petroleum products; and

(iii) Upon selection of a successful bid, DOE shall notify the apparently successful offeror.

(3) Repayment to the SPR for an exchange by solicitation shall be in the form of barrels of petroleum products or another form of repayment as permitted by law, and may be calculated based on any rate table, if applicable, and shall include the following:

(i) Principal amount of petroleum product owed to SPR in the case of an exchange or a deferred contractually scheduled delivery;

(ii) Costs incurred by DOE in conducting the exchange; and

(iii) A premium for each prospective date for repayment.

(4) Based on the market analysis described in paragraph (c)(5) of this section, DOE may refuse offers, decrease the rate of acquisition, or suspend the exchange process if DOE determines acquisition will add significant upward pressure to prices either regionally or on a worldwide basis. DOE may consider recent price changes, private

inventory levels, petroleum product acquisition by other stockpiling entities, the outlook for world petroleum products production, incipient disruptions of supply or refining capability, logistical problems for moving petroleum products, macroeconomic factors, and any other considerations that may be pertinent to the balance of petroleum product supply and demand.

(5) Market analysis:

(i) DOE shall establish a market value for each petroleum product to be acquired based on a market analysis at the time of contract award.

(ii) DOE may consider prices on futures markets, spot markets, recent price movements, current and projected shipping rates, forecasts by the DOE Energy Information Administration, and any other analytic tools available to DOE to determine the most desirable purchase profile.

(iii) DOE may also consider factors including recent price changes, private inventory levels, petroleum product acquisition by other stockpiling entities, the outlook for world petroleum product production, disruptions of supply or refining capability, logistical problems for moving petroleum products, macroeconomic factors, and any other considerations that may be pertinent relevant to the balance of petroleum product supply and demand.

§ 626.8 Deferrals of contractually scheduled deliveries.

(a) *General.* (1) DOE prefers to take deliveries of petroleum products for the SPR at times scheduled under applicable contracts. However, in the event the market is distorted by disruption to supply or other factors, DOE may defer scheduled deliveries or consider deferral requests from awardees.

(2) An awardee seeking to defer scheduled deliveries of petroleum products to the SPR may submit a deferral request to DOE.

(b) *Deferral criteria.* DOE shall only grant a deferral request for negotiation under paragraph (c) of this section if it determines that DOE can receive a premium for the deferral and, based on DOE's deferral analysis, that at least one of the following conditions exists:

(1) DOE can reduce the cost of its petroleum products acquisition per barrel and increase the volume of petroleum products being delivered to the SPR by means of the premium barrels required by the deferral process;

(2) DOE anticipates private inventories are approaching a point where unscheduled outages may occur;

(3) There is evidence that refineries are reducing their run rates for lack of feedstock; or

(4) There is an unanticipated disruption to petroleum product supply.

(c) *Negotiating terms.* (1) If DOE decides to negotiate a deferral of deliveries, DOE shall estimate the market value of the deferral and establish a strategy for negotiating with suppliers the minimum percentage of the market value to be taken by the Government. During these negotiations, if the deferral request was initiated by DOE, DOE may consider any reasonable, customary, and applicable costs already incurred by the supplier in the performance of a valid contract for delivery. In no event shall such consideration account for any consequential damages or lost profits suffered by the supplier as a result of such deferral.

(2) DOE shall only agree to amend the contract if the negotiation results in an agreement to give the Government a fair and reasonable share of the market value.

§ 626.9 Suspension and pre-drawdown diversion.

Where the Secretary has found that a severe energy supply interruption may be imminent, the Secretary may suspend any previously announced or contracted acquisition of any petroleum product by the SPR or injection of petroleum products into the SPR; or

sell any petroleum product acquired for injection into the SPR that has not yet been injected into the SPR.

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